STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 12, 2004
v	No. 251589 Wayne Circuit Court
WILLIAM LEWIS, Defendant-Appellant.	LC No. 01-005014-01

Before: Schuette, P.J., and Bandstra and Meter, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of two counts of armed robbery, MCL 750.529, and one count of possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to concurrent terms of 18 to 30 years in prison for the armed robbery convictions, to run consecutive to two years in prison for the felony-firearm conviction. We affirm.

Defendant first argues that he was denied effective assistance of counsel because defense counsel failed to impeach a police investigator with testimony that the investigator gave against defendant in a federal trial on a different armed robbery charge. We disagree.

"To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms." *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). "Defendant must further demonstrate a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, *and* the attendant proceedings were fundamentally unfair or unreliable." *Id*. Additionally, "defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy." *People v Riley (After Remand)*, 468 Mich 135, 140; 659 NW2d 611 (2003).

Defendant argues that defense counsel was ineffective for failing to impeach a police investigator with testimony that the investigator gave against defendant in his federal trial for a different armed robbery. The armed robbery at issue in the federal trial occurred after the armed robberies in the instant case, but involved the same weapons. Defendant maintains that during the trial in the instant case, the investigator testified that both weapons used in the robbery were "taken from the person of defendant," but that at the federal trial, the investigator testified that the weapons were found in defendant's car. But defendant mischaracterizes the investigator's

testimony in both cases. In the federal trial, the investigator testified that one of the weapons was taken by the victim from defendant, and the other weapon was found in defendant's car. In the instant case, the investigator testified that although he was not present when defendant was arrested, he was aware that two guns were seized as evidence against defendant during the arrest. Contrary to defendant's assertion on appeal, the investigator never specifically testified that the guns were "taken from the person" of defendant.

We find nothing in the record to support defendant's assertion that his trial counsel was ineffective for failing to impeach the investigator with testimony from defendant's federal trial. Indeed, defendant has not demonstrated that impeachment was a viable option, given that the investigator's testimony in the instant case was not inconsistent with his testimony during the federal trial. Moreover, defendant has not overcome the strong presumption that defense counsel's decision not to impeach the investigator was sound trial strategy. Had defense counsel attempted to impeach the investigator with his allegedly inconsistent testimony, it would have called to the jury's attention the fact that defendant had been on trial for a different armed robbery. Sound trial strategy dictated defense counsel's decision to refrain from introducing such prejudicial evidence, and we find no ineffective assistance regarding this claim.

Defendant also argues that he was denied effective assistance of counsel because defense counsel did not move to suppress the pretrial identification of defendant by one of the victims. We disagree. Because defendant failed to raise this claim in his motion for a new trial on the basis of ineffective assistance of counsel, our review of this issue is limited to mistakes apparent on the record. *Rodgers*, *supra* at 713-714.

Defendant argues that defense counsel was ineffective for failing to move to suppress his pretrial identification by one of the victims on the basis that the pretrial lineup was unduly suggestive, thereby rendering the identification irreparably unreliable. See *People v Hornsby*, 251 Mich App 462, 466; 650 NW2d 700 (2002). Specifically, defendant argues that the pretrial identification was inadmissible because he was the only person in the lineup that had gray hair, facial hair, and was wearing slacks and a dress shirt. But "'physical differences between a suspect and other lineup participants do not, in and of themselves, constitute impermissible suggestiveness . . . .'" *People v Kurylczyk*, 443 Mich 289, 312; 505 NW2d 528 (1993), quoting *People v Benson*, 180 Mich App 433, 438; 447 NW2d 755 (1989), rev'd in part on other grounds 434 Mich 903; 453 NW2d 681 (1990). Instead, "[d]ifferences among participants in a lineup 'are significant only to the extent they are apparent to the witness and substantially distinguish defendant from the other participants in the line-up . . . .'" *Kurylczyk*, *supra* at 312, quoting *People v James*, 184 Mich App 457, 466; 458 NW2d 911 (1990), vacated on other grounds 437 Mich 988; 469 NW2d 294 (1991).

Defendant also argues that the pretrial identification was inadmissible because the investigator allegedly told the victim that "there might be a suspect in the lineup." However, this Court has held that the fact that a victim is told that a suspect is in the lineup does not alone render the lineup unduly suggestive. *People v Sawyer*, 222 Mich App 1, 3; 564 NW2d 62 (1997).

We find nothing in the record to support defendant's assertion that the pretrial lineup was impermissibly suggestive. The investigator who organized and conducted the lineup testified that it occurred six days after the robbery, and that an attorney was present to monitor the lineup

to ensure that it was not unduly suggestive. The investigator testified that he selected individuals for the lineup that were the same sex and race as defendant, and that appeared to be in the same age, height, and weight range. Further, the victim testified that she had an extensive opportunity to observe defendant during the robbery, including while they were standing at a well-lighted street corner engaged in face-to-face conversation. Further still, the investigator testified that the victim immediately gave a "strong, positive identification" of defendant at the lineup. Accordingly, we find that the victim's pretrial identification of defendant was properly admitted at trial. And because trial counsel is not ineffective for failing to bring a futile motion, defense counsel was not ineffective for failing to move to suppress the victim's pretrial identification of defendant. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).

Defendant next argues that his convictions should be reversed due to a violation of the Interstate Agreement on Detainers (IAD), MCL 780.601. We disagree. We review de novo the interpretation and application of statutes. *People v Webb*, 458 Mich 265, 274; 580 NW2d 884 (1998).

The IAD is an agreement between the State of Michigan and other jurisdictions setting out the procedure by which a prisoner convicted and imprisoned in one jurisdiction may be brought to trial on outstanding charges in another jurisdiction. Article I of the IAD provides that the purpose of the agreement is to "encourage the speedy disposition of charges pending against prisoners and thus prevent undue interference with prisoner treatment and rehabilitation programs." *People v Wilden (On Rehearing)*, 197 Mich App 533, 535; 496 NW2d 801 (1992). Article IX provides that the IAD is to be liberally construed to effectuate its purposes. Article III provides in pertinent part:

> (a) Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party state, and whenever during the continuance of the term of imprisonment there is pending in any other party state any untried indictment, information or complaint *on the basis of which a detainer has been lodged against the prisoner*, he shall be brought to trial within one hundred eighty days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officers' jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information or complaint: Provided that for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance. The request of the prisoner shall be accompanied by a certificate of the appropriate official having custody of the prisoner, stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the state parole agency relating to the prisoner. [Emphasis added.]

Article IV provides in pertinent part:

> (e) If trial is not had on any indictment, information or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to Article V(e) hereof, such indictment, information or complaint shall

not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

Here, defendant claims that the IAD was violated when he was removed from a federal prison where he was serving a prior conviction, brought to state court for a pretrial hearing, and returned to federal prison while awaiting trial. But there is no indication that a detainer was lodged against defendant so as to implicate the IAD.

"A detainer is "'a notification filed with the institution in which a prisoner is serving a sentence, advising that he is wanted to face pending criminal charges in another jurisdiction.'" *People v McLemore*, 411 Mich 691, 692 n 2; 311 NW2d 720 (1981), quoting *United States v Mauro*, 436 US 340, 359; 98 S Ct 1834; 56 L Ed 2d 329 (1978), quoting HR Rep No. 91-1018, p 2 (1970); S Rep No. 91-1356, p 2 (1970); US Code Cong & Admin News 1970, p 4865. "A writ of habeas corpus ad prosequendum, on the other hand, 'is an order by a court directing authorities to produce a prisoner to face criminal charges' and is *not* considered a detainer, regardless of whether it is issued by a state or by a federal court." *Wilden*, *supra* at 537-538, quoting *McLemore*, *supra* at 692 n 1. A "writ of habeas corpus ad prosequendum remains available as means for a state to seek temporary custody of an accused incarcerated in another jurisdiction," and "[t]he decision by federal authorities to honor a writ in the absence of a detainer as a matter of comity does not trigger the provisions of the [IAD]." *McLemore*, *supra* at 694.

Here, the record reveals that defendant was transferred from federal prison to the custody of the Wayne County Sheriff's Department for a pretrial hearing, pursuant to a writ of habeas corpus dated February 12, 2002. At the pretrial hearing on February 15, 2002, defendant moved to withdraw his trial counsel. The trial court granted defendant's motion, appointed different trial counsel, and scheduled trial for June 10, 2002. Defendant was returned to federal custody while awaiting trial, and was then transferred back to the custody of the Wayne County Sheriff's Department for trial, pursuant to a writ of habeas corpus dated May 31, 2002. Accompanying the second writ was a notice to the federal authorities explaining that the purpose of the writ was to allow defendant to be tried on the charges in the instant case. Given that there is nothing in the record to indicate that a detainer was lodged against defendant in the present case, we find that the IAD does not apply, and defendant's argument that plaintiff violated the IAD is without merit. *People v Gallego*, 199 Mich App 566, 574; 502 NW2d 358 (1993).[1]

Defendant next argues that plaintiff violated MCR 6.201(A)(6) by failing to provide him an opportunity to inspect the guns that were seized at the time of his arrest, and by failing to notify him that the guns would be introduced at trial. Defendant failed to object to the admission of the guns into evidence at trial; therefore, our review is limited to plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

[1] The writ of habeas corpus was issued for the explicit purpose of having defendant produced to face the instant criminal charges, and the fact that the writ was not specifically termed "ad prosequendum" is of no matter. *Wilden*, *supra* at 538.

MCR 6.201(A)(6) provides in pertinent part: "a party *upon request* must provide all other parties . . . a description of and an opportunity to inspect any tangible physical evidence that the party intends to introduce at trial." (Emphasis added.) Because defendant never requested that plaintiff provide him a description of and an opportunity to inspect the guns introduced at trial, defendant's claimed violation of MCR 6.201(A)(6) is without merit. Defendant has not established error, plain or otherwise; therefore, this issue is forfeited.

Finally, defendant argues that the trial court erred in assessing him 75 points for prior record variable 1 (PRV-1). MCL 777.51(1)(a). Defendant claims that this scoring error caused the trial court to base his minimum sentence for the armed robbery counts on an incorrect guidelines range of 135 to 225 months. Defendant argues that had PRV-1 been properly scored at 50 points, the recommended guidelines range for his minimum sentence would have been 126 to 210 months. "This Court shall affirm sentences within the guidelines range absent an error in scoring the sentencing guidelines or inaccurate information relied on in determining the defendant's sentence." *People v Leversee*, 243 Mich App 337, 348; 622 NW2d 325 (2000); MCL 769.34(10).

MCL 777.51(1)(a) provides that 75 points should be scored for PRV-1 if "[t]he offender has 3 or more prior high severity felony convictions." MCL 777.51(2) defines "prior high severity felony conviction" as a conviction "for a felony under a law of . . . another state corresponding to a crime listed in offense class M2, A, B, C, or D, if the conviction was entered before the sentencing offense was committed." Defendant's presentence investigation report reveals that he was convicted of three high severity felonies in California before committing the offenses involved in the instant case: "Burglary—1st Degree—Weapon Used," a class B felony in Michigan (MCL 750.110a(5)), and two counts of armed robbery, a class A felony in Michigan (MCL 750.529). Therefore, defendant had three qualifying prior high severity felony convictions at the time he committed the offenses in the instant case. Accordingly, defendant was properly scored 75 points for PRV-1, and his minimum sentence of 216 months for the armed robbery convictions fell within the appropriate sentencing guidelines range of 135 to 225 months.

We affirm.

/s/ Bill Schuette
/s/ Richard A. Bandstra
/s/ Patrick M. Meter